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Nos. 03-1164 and 03-1165

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In The
Supreme Court of the United States

ANN VENEMAN, SECRETARY UNITED STATES DEPARTMENT OF AGRICULTURE, ET AL.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.,

Respondents.

NEBRASKA CATTLEMEN, INC., ET AL.,

Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Beef Promotion and Research Act of 1985 (Beef Act), 7 U.S.C. §§ 2901 *et seq.*, and the implementing Beef Promotion and Research Order (Beef Order), 7 C.F.R. Part 1260, violate the First Amendment insofar as they require cattle producers to pay assessments to fund generic advertising with which they disagree.

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STATEMENT OF INTEREST

The State of California, through its Attorney General, submits this *amicus curiae* brief in support of petitioners.[1] The State of California has vital interests in this matter because more than 60 percent of California's $26 billion agricultural industry is regulated through state marketing programs that are analogous to the beef program at issue in the present case.[2]

California is the largest agricultural producer and exporter in the United States. California produces more than 350 different crops, including more than half of the

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[1] California does not disagree with the positions taken in the *amicus* brief of Texas and 32 other states and Puerto Rico, but submits this brief to provide the Court with its unique perspective gained from its extensive experience with generic marketing programs.

[2] California Department of Food and Agriculture, Marketing Branch, *What do Marketing Programs do – who benefits from them?*, *at* http://www.cdfa.ca.gov/mkt/mkt/mktb-4.html (last visited Aug. 17, 2004). In addition, although California nectarines, peaches, almonds, and olives are not governed by state orders, they are governed by federal marketing orders. 7 C.F.R. Parts 916, 917, 932. California pears, kiwifuit, desert grapes, almonds, walnuts, raisins and dried plums are governed by both state and federal marketing programs. *Compare* 7 C.F.R. Parts 917 (pears), 920 (kiwifruit), 925 (desert grapes), 984 (walnuts), 989 (raisins) *and* 993 (dried prunes) *with* California Pear Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/pear.pdf (last visited Aug. 17, 2004), Cal. Food & Agric. Code §§ 68001-68140 (West 1997) (kiwifruit), Cal. Food & Agric. Code §§ 65500-65675 (West 1997) (table grapes), Cal. Food & Agric. Code §§ 77001-77195 (West 1997) (walnuts), Marketing Order for California Raisins, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/raisin.pdf (last visited Aug. 17, 2004), *and* Marketing Order for California Dried Plums as Amended, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/raisin.pdf (last visited Aug. 17, 2004).

nation's total of fruits, nuts and vegetables.[3] It is the leading domestic producer of 75 different crop and livestock commodities and is the sole domestic producer of several products, including almonds, artichokes, raisins, nectarines, and walnuts.[4]

Agriculture is a vital part of California's economy. In 2001, the gross cash income from California agriculture was $27.6 billion.[5] Agriculture provides 15.1 percent of the jobs in the state.[6] California leads the nation in agricultural exports, shipping more than $6.5 billion in food and agricultural commodities annually.[7]

Agriculture has an importance over and above its contributions to California's economy. California's "laws reflect a long-standing political judgment that 'agriculture' – unlike bicycle manufacturing or clothing production, for example – cannot be allowed to disappear from the American economy because of untrammeled market forces . . . ." *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 524 (2000) (*Gerawan I*) (George, C.J., dissenting). A healthy and productive agricultural economy is necessary to

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[3] California Department of Food and Agriculture, *2002 Resource Directory*, at 28, *available at* http://www.cdfa.ca.gov/card/pdfs/Statreview.pdf (last visited Aug. 17, 2004).

[4] California produces 99 percent or more of these commodities. *2002 Resource Directory*, *supra*, at 28.

[5] *Id.*

[6] *See* Economic Research Service, U.S.D.A., State Fact Sheets, United States Summary, *at* http://www.ers.usda.gov/StateFacts/CA.htm (last visited Aug. 17, 2004).

[7] *2002 Resource Directory*, *supra*, at 32; The California Technology, Trade and Commerce Agency, *California's International Trade 2002*, *available at* http://www.commerce.ca.gov/ttca/pdfs/link_overview/int_trade/CAExports2002.pdf (last visited Aug. 17, 2004).

ensure that domestic farms are able to produce an adequate food supply for our own citizens. Cal. Gov't Code § 51220(a) (West 1985); *see also* J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 Mercer L. Rev. 736, 773 (1993). Maintaining a healthy agricultural economy is also necessary to preserve a way of life. The rural middle class, composed of relatively small family farmers, provides the primary support for local community businesses, schools, parks and churches. As the number of small farmers declines, rural poverty increases, and the health and vitality of rural communities decline. Floyd D. Shimomura, *A New Look At the California Marketing Act of 1937*, 5 U.C. Davis L. Rev. 190, 193 (1972); Matthew M. Harbur, *Anti-corporate, Agricultural Cooperative Laws and the Family Farm*, 4 Drake J. Agric. L. 385, 386-67 (1999).

California has extensive experience with agricultural commodity promotion programs that are analogous to the beef promotion program at issue in this action. California has authorized marketing orders to conduct agricultural commodity advertising and promotional programs since 1937, when its statutes were enacted. Cal. Food & Agric. Code §§ 58601-59293 (West 1997); 1937 Cal. Stats., ch. 404, at 1329. Through its comprehensive oversight and regulation of its agricultural sector, California has direct experience with various modes of agricultural regulation, including marketing and promotion programs. California is particularly well-situated to discuss the fundamental regulatory role played by these programs.

SUMMARY OF ARGUMENT

1. Agriculture is inherently subject to destabilizing "boom and bust" cycles. The nature of agricultural production severely limits farmers' ability to adjust supply to demand. This problem is exacerbated by the distribution of production among many small producers, each producing largely undifferentiated commodities. As a result, farmers are price takers who lack the ability to significantly impact the market. To mitigate these impacts, state and federal governments have developed programs that regulate the marketing of agricultural goods. California uses marketing programs as one of its primary methods of regulating agriculture. Generic advertising has proven to be one of the most successful means of regulating marketing and mitigating "boom and bust" cycles by increasing demand for agricultural commodities.

2. The program conducted under the Beef Act is government speech. The government may fund its own speech through money exacted through taxes, fees or assessments, regardless of whether citizens object to being compelled to contribute to the funding of the speech. The government can speak for itself or can enlist a private speaker to communicate its message. Determining whether the government itself is speaking requires a fact-based analysis of the structure of each program. In determining whether the government is communicating its own message through a private speaker, the critical consideration is whether the message communicated is the government's message. Where a program carries out the government's legitimate public policy objectives by articulating the government's programmatic message, the speech of that program is government speech.

3. The program conducted under the Beef Act is also justified because it meets the intermediate scrutiny standard applicable to commercial speech. Although the Court of Appeals applied *Central Hudson*'s intermediate scrutiny standard to the Beef Act, it did not conduct a careful analysis of applicable factors. *Central Hudson* requires a fact-intensive examination of each program, that program's purpose and its effectiveness in achieving that purpose.

ARGUMENT

A. STABILIZING AGRICULTURAL MARKETS HAS BEEN THE CONSISTENT ECONOMIC PURPOSE OF GOVERNMENT REGULATION OF AGRICULTURE, BUT THE PRIMARY MEANS HAS SHIFTED FROM CONTROLLING SUPPLY TO EXPANDING MARKETS.

The agricultural sector is naturally subject to alternating market gluts and scarcity, creating instability in an essential industry. Both at the state and federal levels, legislatures have struggled to create regulatory structures that will stabilize agriculture. Over time, agricultural commodity marketing programs have come into prominence as means to combat the "boom and bust" cycles intrinsic to agriculture by increasing demand for a product.

1. Agriculture Is Subject to Destabilizing "Boom and Bust" Cycles.

The nature of agriculture severely limits farmers' ability to respond to the laws of supply and demand,

leading to market instability and "boom and bust" pricing cycles. Looney, *supra*, at 767. Jon Lauck, *After Deregulation: Construction Agricultural Policy in the Age of "Freedom to Farm,"* 5 Drake J. Agric. L. 3, 7 (2000). Agricultural production is dependent on biological processes, such as weather conditions and pests, that cannot be controlled by the farmers. Looney, *supra*, at 767-68. Additionally, perennial crops, such as peaches and plums, must be planted years before they will be productive.[8] When prices are high, farmers will invest to meet the demand, increasing supply in the fol-lowing seasons. Eventually, this excess supply creates a market glut and drives down prices, sometimes to a level that falls below the cost of production.

This cycle is described in *Parker v. Brown*, 317 U.S. 341 (1943), where this Court considered one of California's early raisin marketing programs. The instability that was the impetus for California's marketing program began with the early successes in the raisin industry. Between 1914 and 1920, there was a "spectacular rise" in the price for raisin grapes. *Parker*, 317 U.S. at 363. In response, California farmers planted many additional acres of grapevines. With the rising supply came a reduction in the price of raisins. The price fell from a high of $235 per ton in 1921, to $40 to $60 per ton in the period 1922 to 1926. The drop in prices, however, did not result in a corresponding drop in supply. Instead, acreage continued to increase

[8] Harry M. Kaiser, *The Domestic Impacts of the Walnut Marketing Board's Marketing Programs*, NICPRE Quarterly, Vol. 8, No. 1 (2002) *available at* http://commodity.aem.cornell.edu/nicpre/newslet/vol8no1/index.htm (because of the relatively long per-iod between planting new trees and nut harvest, "harvest in any particular year is generally a function of yield, which is influenced by weather conditions and is largely unaffected by price.").

until 1926, and production reached its peak in 1938. As a result, for many years, raisins were selling at less than the cost of production. *Id.* at 363-64.

The cycle described in *Parker* is not unusual in the agricultural sector. Even where a crop is planted yearly with an eye on demand, farm production is seasonal and depends upon natural conditions, such as weather and pests. Increases in supply, in the absence of corresponding increases in demand, result in lower prices. Robert Scott, *Exported to Death: The Failure of Agricultural Deregulation*, 9 Minn. J. Global Trade 87, 90 at n.13 (2000); *see also* Jim Chen, *The American Ideology*, 48 Van. L. Rev. 809, 857 (1995) ("Increased supply suppresses the price of any given agricultural commodity. And falling prices do not increase total demand by price-inelastic food consumers."). Agricultural markets respond poorly to these conditions. Instead of adjusting supply when prices fall, farmers often maintain production levels, or even increase production to hedge against natural conditions or to compensate for the lower prices, thereby depressing prices even further. Lauck, *supra*, at 7, n.11. Advances in technology have not eliminated this problem. Modern technology has provided farmers with the ability to increase their production. But increased production increases supply, which depresses prices. *Id.* at 7; *see also* Chen, *supra*, at 846-47. "The drop in prices increases the pressure to push production even more, with resort to even more advanced technology and even greater reliance on borrowed capital." Chen, *supra*, at 847; *see also* Lauck, at 7.

The impact that these cycles have on farmers is exacerbated by the atomistic nature of the farmer. Agriculture is made up of widely disbursed producers, no one of whom is sufficiently large to have a significant effect on

the market. Looney, *supra*, at 767. In California alone, there are approximately 80,000 farms, averaging 346 acres.[9] Eighty percent of these farms are operated by an individual or a family.[10] The commodities produced by these farms are largely undifferentiated, and often perishable. At the same time, these farmers are selling to a relatively small number of middlemen. These circumstances create uneven bargaining power between the farmers and the middlemen to whom they sell, leaving farmers at the mercy of the small number of buyers. Shimomura, *supra*, at p. 194; Lauck, *supra*, at 8. As this Court has recognized, "[i]t is folly to suggest to the farmer with a carload of cattle on the market to 'take them home' or to 'haul back his load of wheat' or other commodity." *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816, 840 (1977) (White, J., dissenting) (quoting 59 Cong. Rec. 7856 (1920)). As a result, farmers are price takers, not price makers. They receive lower prices than they would if bargaining power were more equal. Lauck, *supra*, at 8; *see also* Olan D. Forker & Ronald W. Ward, Commodity Advertising: The Economics and Measurement of Generic Programs 7 (1993). At least one commentator

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[9] National Agricultural Statistics Service, 2002 Census of Agriculture, State Profile, California, *available at* http://www.nass.usda.gov/census/census02/profiles/ca/cp99006.PDF (last visited Aug. 17, 2004).

[10] National Agricultural Statistics Service, 2002 Census of Agriculture, California State Level Data, Table 58, *available at* http://www.nass.usda.gov/census/census02/volume1/ca/st06_1_058_058.pdf (last visited Aug. 17, 2004). Nationally, 90 percent of farms are owned by an individual or a family. USDA, 2002 News Release, National Agricultural Statistics Services, USDA Releases 2002 Census of Agriculture, *available at* http://www.usda.gov/nass/events/news/consusjune3release.htm (last visited Aug. 17, 2004).

has theorized that, in light of this unequal bargaining power, "[i]t is only through concerted marketing efforts that the state's independent farmers will be able to preserve a role for the small but efficient farming unit within California agriculture." Shimomura, *supra*, at 195.

This combination of factors creates unique regulatory problems. One legislative response to these problems was to create marketing programs designed to mitigate the effects of the "boom and bust" cycles.

2. Promotional Programs Regulate Agriculture and Minimize "Boom and Bust" Cycles by Increasing Demand for Agricultural Commodities.

The Beef Act at issue in this case is one of many federal programs designed to aid farmers through a generic marketing and promotion program funded by user fees. While California's programs contain features that are different from the Beef Act, California relies on these programs as a primary means of regulating agriculture.

These programs grew out of the chaotic conditions in California agriculture in the early twentieth century. *Gerawan Farming, Inc. v. Kawamura*, 33 Cal. 4th 1, 7 (2004) (*Gerawan II*). Small growers were competing in unstable and fluctuating markets, struggling to sell their products at a price that would cover at least their production costs. Shimomura, *supra*, at 197. This unregulated scramble gave rise to destructive trade practices. Because the grower that reached the market first received the best price, growers would ship unripe produce to market, flooding markets with produce of marginal quality. To make the produce more attractive, some farmers would

even engage in deceptive packaging, such as placing higher quality produce over inferior produce, using improper sampling, and false grading. *Gerawan II*, 33 Cal. 4th at 7; Shimomura, *supra* at 197. These practices only injured the market in the long run, reducing consumer acceptance of California produce. Shimomura, *supra*, at 197.

Many farmers responded to these conditions by forming cooperatives, in an attempt to regulate the quality and volume of the agricultural commodities that were marketed. While these cooperatives provided some stability, they were hampered by their inability to regulate all producers of a particular commodity. The minority that refused to join undermined the cooperative effort, while taking advantage of the increased prices resulting from those efforts. *Id.* at 197; *see also Agricultural Prorate Comm'n v. Superior Court*, 5 Cal.2d 550, 574 (1936) (voluntary volume controls on lemons undermined because a minority of growers refused to cooperate).

The Great Depression of 1929 devastated the state's already weakened agricultural economy. Demand for California products dropped dramatically, while the supply continued unabated. Shimomura, *supra*, at 198. In the three years from 1929 to 1932, prices for farm commodities fell by 56 percent, and net farm income fell by 70 percent.[11]

Recognizing that governmental intervention was necessary to stabilize agriculture, the California Legislature

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[11] John M. Crespi, *Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles*, at 6, *available at* http://commodity.aem.cornell.edu/nicpre/bulletins/rb0104.pdf (last visited Aug. 17, 2004).

passed the California Marketing Act of 1937 (CMA). Cal. Food & Agric. Code §§ 58601-59293 (West 1997); 1937 Cal Stats., ch. 404, at 1329. The CMA authorized the Secretary of the California Department of Food and Agriculture to enter into marketing agreements with farmers and distributors of farm products. The California Legislature provided that these marketing agreements can contain a wide range of regulations, including volume, grade, size and quality controls. Marketing orders can also be used to establish surplus pools. 1937 Cal. Stats., ch. 404, at 1334-35, § 1300.14(b)(2)-(6); Cal. Food & Agric. Code §§ 58881-58896 (West 1997) (listing provisions that may be contained in marketing orders). From its inception, the CMA also provided for "the establishment of plans for advertising and sales promotion to create new or larger markets for agricultural commodities grown in the State of California." 1937 Cal. Stats., ch 404, at 1335, § 1300.14(b)(7); *see also Gerawan II*, 33 Cal. 4th at 8. "These programs were rooted in the considered legislative judgment that government intervention in agricultural markets was necessary to preserve the agricultural industry." *Gerawan II*, 33 Cal. 4th at 7.

Since the 1930s, volume controls have become less favored, in part because legislatures perceive that supply controls harm consumers. Hoy F. Carman et al., *Marketing California's Agricultural Production*, *in* CALIFORNIA AGRICULTURE: DIMENSIONS AND ISSUES 115-16 (Jerry Siebert ed., 2004). In contrast, generic promotion and advertising for agricultural commodities have come into prominence as a way of approaching the supply-demand problem by increasing demand rather than by limiting supply. There are currently 25 marketing orders and 2 marketing agreements established under the CMA. The California Legislature

has also created 3 "councils" and 20 "commissions" to regulate the marketing of agricultural commodities.[12] Although the councils and commissions were not created under the CMA, they are an extension of the CMA's policy of instituting industry specific regulation, tailored to meet the needs of that industry. The components of each of these programs varies with the needs of the industry. Many of these programs include advertising and promotion.[13] Some have embedded quality control provisions.[14] Others are limited to conducting research.[15] All of these

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[12] California Department of Food and Agriculture, Marketing Branch, *How Many Marketing Programs Are There . . . And Who Pays for Them?*, *available at* http://www.cdfa.ca.gov/mkt/mkt/mktb-2.html (last visited Aug. 17, 2004).

[13] *See, e.g.*, Marketing Order for Research, Education and Promotion of Market Milk and Dairy Products in California, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/marketmilk.pdf (last visited Aug. 17, 2004).

[14] *See, e.g.*, California Canteloupe Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/marketmilk.pdf (last visited Aug. 17, 2004); Marketing Order for Dried Figs, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/marketmilk.pdf (last visited Aug. 17, 2004); California Pear Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/pear.pdf (last visited Aug. 17, 2004); and California Plum Marketing Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/plum.pdf (last visited Aug. 17, 2004).

[15] California currently has 7 research only programs. Alfalfa Seed Production Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/alfalfaseed.pdf (last visited Aug. 17, 2004); California Celery Research Advisory Board, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/celery.pdf (last visited Aug. 17, 2004); California Citrus Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/ctrus.pdf (last visited Aug. 17, 2004); California Lettuce Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/Lettuce.PDF (last visited Aug. 17, 2004); California Melon Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/melons.pdf (last visited Aug. 17, 2004); California Potato Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/potato.pdf (last visited Aug. 17, 2004); California Rice

(Continued on following page)

programs are designed to stabilize and expand the markets for California agricultural products.

Through these programs, both small and large producers have been able to pool their resources to reach consumers and increase demand for these commodities. Forker & Ward, *supra*, at 7. Studies of these programs show that they are cost effective.[16] The creation of a mechanism whereby farmers can join together in marketing their product is particularly important today, when agricultural products must compete against highly advertised brands, widely promoted by giant conglomerates. The visibility that can be achieved through promotion programs is more important than ever in stabilizing the balance between supply and demand for agricultural products. *See* Daniel I. Padberg & Charles Hall, *The Economic Rationale for Marketing Orders*, 5 San Joaquin Agric. L. Rev. 73, 82 (1995).

Research Program, *available at* http://www.cdfa.ca.gov/mkt/mkt/pdf/rice.pdf (last visited Aug. 17, 2004); California Grape Rootstock Commission, Cal. Food & Agric. Code §§ 74701-74796 (West 1997); California Pepper Commission, Cal. Food & Agric. Code §§ 77201-77376 (West 1997).

[16] For example, a November 1997 study of the California Table Grape Commission's program conservatively estimates that it produces net industry returns of $5 for every $1 spent, and indicates that the benefits may be even higher. Julian M. Alston et al., *The California Table Grape Commission's Promotion Program: An Evaluation*, at 77 (University of California, Giannini Monograph, No. 43, 1997). Studies of the returns on programs for California avocados, prunes, almonds, eggs, raisins, and walnuts have found that advertising and promotion programs increased demand for these commodities and the returns from these programs "exceeded costs by a significant margin." Carman, *supra*, at 114.

B. THE BEEF ACT PROGRAM IS GOVERNMENT SPEECH THAT DOES NOT VIOLATE THE FIRST AMENDMENT.

The Eighth Circuit below rejected the argument that the Beef Act's program is permissible because it is government speech. Appendix to Petition for Writ of Certiorari (Pet. App.) 17a-19a. The *Livestock Marketing* court concluded that the government speech doctrine applies only in challenges to the government's speech, and does not apply to challenges to the government's authority to compel the funding of particular speech programs. *Id.* There is no basis for this conclusion. Instead, this Court's decision in *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000), indicates that the government speech doctrine is applicable to compelled speech claims.

In *Southworth*, this Court addressed a challenge to a university's mandatory student fee, which was used to fund political and ideological speech. Had the speech been that of the university, it would have been government speech, and permissible as long as there were sufficient political controls to ensure responsible government action. *Southworth*, 529 U.S. at 229. As the Court explained:

> It is inevitable that government will adopt and pursue programs and policies within its constitutional powers but which nevertheless are contrary to the profound beliefs and sincere convictions of some of its citizens. The government as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other

> expression to advocate and defend its own policies . . . .

Southworth, 529 U.S. at 229. Similarly, here, the generic advertising conducted under the Beef Act is permissible because it is government speech.

In determining whether the government is speaking through a program, the critical consideration is whether the program conveys the government's own message. *Legal Services Corp. v. Velasquez*, 531 U.S. 533, 541-42 (2001). The government's ability to control the content of its own message does not depend upon whether the money used to fund the speech is collected through taxes or instead through other, more targeted exactions, such as tuition in a university setting. *Southworth*, 529 U.S. at 229. Where a program is found to be government speech, that program is permissible as long as the "political controls to ensure responsible government action" are "sufficient to overcome First Amendment objections and to allow the challenged program under the principle that the government can speak for itself." *Southworth*, 529 U.S. at 229.

There are two ways in which a generic marketing program can be considered speech of the government. First, where the speaker is a governmental entity, its speech is government speech. *Cf. Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990) ("With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process"). A government entity may engage in any speech that is within the scope of its statutory authority. *Id.* at 14; *cf. Southworth*, 529 U.S. 229 (if the challenged speech were that of the university, the only

limitation would be the question of whether there were sufficient political controls). Often, it is not difficult to determine the speaker is a governmental entity. For example, where the Secretary of Agriculture advocates a government program, her speech is government speech. In light of the myriad entities involved in California's marketing programs, the question has sometimes been made to appear difficult. While the language and details vary, however, all these boards and commissions generally, and California's specifically, are public institutions. California's Marketing Orders, issued under the CMA, are advisory boards to the Secretary of Food and Agriculture, with the Secretary himself being the speaker. Cal. Food & Agric. Code §§ 58601-59293 (West 1997). California's agricultural commissions are expressly created by the Legislature as state institutions. *See, e.g.*, Cal. Food & Agric. Code §§ 65500-65675 (West 1997) (California Table Grape Commission); Cal. Food & Agric. Code §§ 67021-67143 (West 1997) (California Avocado Commission).

Given the diversity of forms nationwide, where there is any question of whether the entity that is speaking is a government entity, courts must conduct an in-depth fact-based analysis of the structure of each program to determine whether its speech is that of government. *See Keller*, 496 U.S. at 11 (considering the California State Bar's sources of funding, its membership, and whether it exercises governmental power, in determining whether California State Bar is a government entity).

Second, the government may enlist a private speaker to communicate its message. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("we have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it

enlists private entities to convey its own message.") In determining whether the government is communicating its own message through a private speaker, the central consideration is whether the chosen speaker conveys the government's own message, or instead facilitates private speech. *See Velasquez*, 531 U.S. at 542. Accordingly, where the government institutes a program to carry out its legitimate public policy objectives and to articulate its own programmatic message, that program is government speech.

Rather than examining the nature of the entity that is speaking, or whether the program is designed to achieve the government's own policy objectives, the circuit courts that have addressed the applicability of the government speech doctrine to generic marketing programs focused on the wrong aspects of the programs to determine whether they are government. These courts of appeals looked at the level of bureaucratic control that the United States Secretary of Agriculture exercises over the programs to determine whether the programs' speech is government speech. *Cochran v. Veneman*, 359 F.3d 263, 273-74 (3d Cir. 2004); *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 162 (6th Cir. 2003); *Pelts & Skins, LLC v. Landreneau*, 365 F.3d 423, 431 (5th Cir. 2004). This focus exalts the very worst aspect of government – bureaucracy – and ignores the public policy purpose behind these programs.

Whether a program is government speech does not turn on the level of bureaucratic control exercised over a program, but instead turns on whether the program delivers the government's message. For example, in *Rust*, the government used private physicians to transmit specific information pertaining to its own program regarding family planning. *Rust v. Sullivan*, 500 U.S. 173, 195 (1991). The

Court found that this program was permissible, and later explained that the basis for this finding was that the government can make viewpoint-based funding decisions when it is using private speakers to transmit its own programmatic message. *Velasquez*, 531 U.S. at 541. In upholding the government's program, the *Rust* Court did not examine the level of bureaucratic controls placed on the speech, or require the exact words used by a physician to be pre-approved by a government official. *See Rust*, 500 U.S. at 179-181 (describing program). Instead, it was sufficient that the government dictated a programmatic message, and speakers were used to transmit that message. *Velasquez*, 531 U.S. at 548.

In contrast, in *Velasquez*, this Court rejected the contention that restrictions on the speech of legal aid lawyers could be justified by the government speech doctrine, because "there was no programmatic message of the kind recognized in *Rust*" that "sufficed to allow the Government to specify the advice deemed necessary for its legitimate objectives." *Velasquez*, 531 U.S. at 548.

The Beef Act is designed to transmit the government's programmatic message. While the structures of these programs vary widely, the common thread is that they are mandated by federal or state legislatures to ensure a stable agricultural economy by maintaining and expanding markets for agricultural goods. *See, e.g.*, Cal. Food & Agric. Code § 58651 (West 1997).

For example, the California Legislature in enacting the CMA found that economic waste of agricultural commodities occasioned by poor marketing practices "jeopardiz[ed] the future continued production of adequate supplies of food" and other farm products. Cal. Food &

Agric. Code § 58651 (West 1997). That waste also yielded low producer income and prevented agricultural sectors from "contributing their fair share to the support of necessary governmental and educational functions" and "tending to increase unfairly the tax burdens of other citizens of this state." *Id.* Accordingly, the California Legislature authorized "the establishment of plans for advertising and sales promotion to maintain present markets or to create new or larger markets" for commodities grown in California. Cal. Food & Agric. Code § 58889 (West 1997).

These are legitimate public policies. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 493-494 (1997) (Souter, J., dissenting); *see also Gerawan II*, 33 Cal. 4th at 22-23. The government is free to articulate its own programmatic message to achieve these ends, regardless of whether the entity that is actually speaking is a government entity or is instead a private speaker transmitting the government's message. As long as the program conveys the government programmatic message in a manner directed to meeting the government's public policy goals, the generic advertising, conducted pursuant to the governmental mandate, is government speech.

C. THE BEEF ACT IS CONSTITUTIONAL UNDER THE INTERMEDIATE SCRUTINY STANDARD APPLICABLE TO COMMERCIAL SPEECH.

The generic advertising conducted under the Beef Act is also constitutional under the intermediate scrutiny applicable to commercial speech. Although the Eighth Circuit below applied intermediate scrutiny standard under *Central Hudson Gas & Electric Corporation v.*

Public Service Commission, 447 U.S. 557 (1980) to the Beef Act, it did so in a cursory manner that did not consider the merits of the Beef Act in light of the needs of the regulated industry. Pet. App. 24a-28a. Instead of examining the purpose of the Beef Act and its application to its industry, the Court of Appeals relied on *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) for the proposition that, in the absence of a larger regulatory scheme, there is an insufficient state interest to support these programs. Pet. App. 26a-27a. In doing so, the Eighth Circuit failed to fully consider factors that are relevant to a *Central Hudson* analysis.

Contrary to the conclusory analysis conducted by the Court of Appeals, the application of the *Central Hudson* test requires a careful analysis of each program. The California Supreme Court has recently considered the application of the *Central Hudson* test to a generic marketing program and provides a sound analysis of how the *Central Hudson* factors apply in this context.[17] In *Gerawan II*, the California Supreme Court considered the application of the *Central Hudson* test to California's Plum Marketing Program, in light of the unique position agriculture holds in

[17] The California Supreme Court had first addressed this issue in *Gerawan I*. In *Gerawan I*, the Court held that, in the context of compelled funding for generic marketing programs, the California Constitution provides greater protection for free speech than does the United States Constitution. *Gerawan I*, 24 Cal. 4th at 517. In *Gerawan II*, the California Supreme Court found that the plum marketing program at issue was ancillary to a broader regulatory scheme, and therefore did not violate the First Amendment of the United States Constitution. *Gerawan II*, 33 Cal. 4th at 20. The court also found that the *Central Hudson* test provides the appropriate framework under the California Constitution. *Gerawan II*, 33 Cal. 4th at 22.

the state and national economics. *Gerawan II*, 33 Cal.4th at 22-24. In so doing, the court did not question that California's "objective of maintaining and expanding markets for agricultural products, thereby ensuring the viability of California agriculture" is a substantial objective. *Gerawan II*, 33 Cal.4th at 22-23. The court recognized that to meet this prong, the State cannot merely rely on legislative declarations, but instead must show that these programs' statutory goals "are in fact the goals of the marketing program at issue in this case," which could only be addressed through an examination of the facts particular to the program. Similarly the remaining two prongs of *Central Hudson*[18] require development of facts relevant to whether the generic advertising conducted by the program is an efficacious means of improving the sale of agricultural products, and whether the scope of the program is "in proportion to the interest served. . . . " *Gerawan II*, 33 Cal. 4th at 23. The court in *Gerawan II* therefore remanded the case to the trial court for the development of an evidentiary record and careful examination of these issues. *Gerawan II*, 33 Cal. 4th at 24. The reasoning of the court in *Gerawan II* was sound, and provides an appropriate framework when applying *Central Hudson* to a generic marketing program.

As in California, there are myriad variations of agricultural marketing and promotion programs existing

[18] The second and third prongs of the *Central Hudson* test are whether the regulation directly advances the governmental interests asserted, and whether the regulation is not more extensive than necessary to serve the government's interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

at the federal level and in almost every state, all for varied commodities with diverging marketing problems. These programs meet their legislative mandates differently. Each of these programs has a structure that is specific to the commodity for which it was designed. *Central Hudson* requires a fact-intensive examination of each program, that program's purpose, and its effectiveness in achieving that purpose.

CONCLUSION

Generic marketing programs, analogous to the Beef Act, are one of California's primary means of regulating agriculture to avoid "boom and bust" cycles. In California, these programs have myriad forms. In each case, determining whether the entity conducting the program is a government entity requires an examination of that particular program. Similarly, application of the *Central Hudson* test to these programs requires a fact-intensive examination of each program, that program's purpose and its effectiveness in achieving that purpose.

Here, the Eighth Circuit failed to apply a fact-intensive analysis to the Beef Act. The Beef Act is constitutional under both the government speech doctrine and the *Central Hudson* test. Accordingly, the judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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